

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, }  
Plaintiff, }  
vs. }  
JOSE DE JESUS }  
SANCHEZ-CISNEROS, }  
Defendant. }

No. CR-09-6060-LRS  
(CV-11-5003-LRS)  
**ORDER DENYING  
§2255 MOTION**

**BEFORE THE COURT** is Defendant's Motion to Vacate, Set Aside, Or Correct Sentence pursuant to 28 U.S.C. §2255 (Ct. Rec. 47).

The court conducts an initial review of a §2255 motion. The initial standard of review for motions under §2255 is whether:

[I]t plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court . . . .

Rule 4(b), **Rules Governing Proceedings in the United States District Courts under Section 2255 of Title 28, United States Code.** This initial review is conducted prior to the court ordering the United States Attorney to file an answer. Based on the court's initial review of Defendant's motion, it will not direct that an answer be filed by the United States Attorney and the court denies Defendant's motion.

**I. BACKGROUND**

Pursuant to a written plea agreement (Ct. Rec. 32), Defendant pled guilty to

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1 an Indictment charging him with Alien in United States After Deportation in  
 2 violation of 8 U.S.C. §1326. He was sentenced on March 25, 2010 to a term of  
 3 imprisonment of 41 months and to a three year term of supervised release. (Ct.  
 4 Rec. 44).

5 Defendant contends his counsel rendered constitutionally ineffective  
 6 assistance in advising Defendant to reject a fast track plea agreement, with the  
 7 result being that the applicable sentencing guideline range (46 to 57 months) was  
 8 higher than it would have been under a fast track plea agreement (33 to 41  
 9 months).

## 10 11 II. DISCUSSION

12 Defendant must prove: (1) counsel's performance was deficient, and (2)  
 13 movant was prejudiced by such deficiency. *Strickland v. Washington*, 466 U.S.  
 14 668, 687, 104 S.Ct. 2052 (1984). As to the first prong, there is a strong  
 15 presumption counsel's performance was sufficiently effective. *Id.* at 689.  
 16 Defendant must show his counsel's performance was "outside the wide range of  
 17 professionally competent assistance." *Id.* at 690. As to the second prong,  
 18 Defendant must demonstrate a reasonable probability that, but for counsel's errors,  
 19 the result of the proceeding would have been different (i.e., a guilty plea would not  
 20 have been entered). A "reasonable probability" is a "probability sufficient to  
 21 undermine confidence in the proceedings. *Id.* at 694.

22 Counsel had a legitimate strategic reason for advising Defendant not to  
 23 accept a fast track plea agreement. Acceptance of such an agreement would have  
 24 required the Plaintiff to agree to a sentence within the 33 to 41 months guideline  
 25 range and forego any opportunity of arguing for a non-guideline sentence below  
 26 33 months based on the 18 U.S.C. §3553(a) factors. This was discussed at  
 27 Defendant's sentencing hearing.

28 On December 22, 2009, Defendant knowingly and voluntarily entered a

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1 guilty plea to the non-fast track plea agreement which preserved his right to argue  
2 for “any sentence” (Ct. Rec. 32 at Paragraph 10). A guilty plea must be a knowing  
3 and intelligent act performed with sufficient awareness of the relevant  
4 circumstances and likely consequences. In order for a criminal defendant to make  
5 an intelligent assessment of the relative advantages of pleading guilty, it is  
6 incumbent upon counsel to provide his client with necessary and accurate  
7 information. A mere inaccurate prediction, standing alone, will not constitute  
8 ineffective assistance, but “gross mischaracterization” of the likely outcome  
9 presented by a case, along with “erroneous advice” falls below the level of  
10 competence required of defense attorneys. *Iaea v. Sunn*, 800 F.2d 861, 865 (9<sup>th</sup>  
11 Cir. 1986). Defense counsel did not guarantee Defendant he would receive a 24  
12 months sentence, or indeed that he would receive any sentence below the 33 to 41  
13 months fast track guideline range. A 24 months sentence is what counsel argued  
14 for at sentencing, but during the prior change of plea hearing, Defendant  
15 specifically acknowledged he understood the court was not obliged to accept the  
16 recommendations of counsel. There is nothing to suggest the performance of  
17 Defendant’s counsel was deficient in any respect.

18 Even assuming there was a deficiency, it did not prejudice the Defendant.  
19 Defendant received a non-guideline sentence of 41 months of incarceration which  
20 was equivalent to the top end of the range which would have applied had there  
21 been a fast track plea agreement. And, as noted, as part of a fast track agreement,  
22 the Defendant would have needed to agree to a sentence within the 33-41 months  
23 range, if not to a specific number of months within the range. There is not a  
24 reasonable probability that Defendant would have been sentenced to a term of less  
25 than 41 months had he entered into a fast track plea agreement. Defendant did not  
26 receive ineffective assistance from his counsel.

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28 //

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### III. CONCLUSION

It "plainly" appears from the face of the §2255 motion and the prior proceedings in the case that Defendant is not entitled to relief. Therefore, it is not necessary to direct the United States to file an answer to the motion and it is not necessary to conduct an evidentiary hearing.

Defendant's Motion to Vacate, Set Aside, Or Correct Sentence pursuant to  
28 U.S.C. §2255 (Ct. Rec. 47) is **DENIED**.

**IT IS SO ORDERED.** The District Court Executive is directed to file this Order and provide copies to Defendant and to counsel for the United States.

**DATED** this 19th day of January, 2011.

*s/Lonny R. Suko*

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**LONNY R. SUKO**  
Chief United States District Judge

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